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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 PHILIP ROGERS,

11 Petitioner,

12 v .

13 R. GROUNDS,

14
15 Respondent.
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) Case No. CV 16-901 JC

) MEMORANDUM OPINION AND
) ORDER DENYING PETITION FOR
) WRIT OF HABEAS CORPUS AND
) DISMISSING ACTION

17 **I. SUMMARY**

18 On February 9, 2016, petitioner, who is in state custody and is proceeding
19 *pro se*, filed a Petition for Writ of Habeas Corpus by a Person in State Custody
20 with an attached memorandum (collectively, "Petition"), challenging a criminal
21 judgment in Los Angeles County Superior Court.¹ Petitioner raises two grounds
22 for relief: (1) blood sample evidence which was forcibly seized from him and the
23 fruits thereof should have been suppressed pursuant to the Fourth Amendment in
24 light of the post-sentencing decision in Missouri v. McNeely, 133 S. Ct. 1552
25 (2013); and (2) his counsel was ineffective because he failed to present evidence
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28 ¹The Court herein refers to the Petition page numbers provided in the Case Management/
Electronic Case Filing (CM/ECF) system.

1 that the pedestrian victim petitioner hit and killed had cocaine in her system at the
2 time of the collision. (Petition at 5, 10-11, 19-26).

3 On April 8, 2016, respondent filed an Answer (“Answer”) and lodged
4 multiple documents (“Lodged Doc.”), including the Clerk’s Transcript (“CT”), and
5 the Reporter’s Transcript (“RT”). Petitioner did not file a Reply.

6 The parties have consented to proceed before the undersigned United States
7 Magistrate Judge. For the reasons explained below, the Petition is denied and this
8 action is dismissed with prejudice.

9 **II. PROCEDURAL HISTORY**

10 On June 26, 2012, a Los Angeles County Superior Court jury found
11 petitioner guilty of gross vehicular manslaughter while intoxicated (Count 1),
12 vehicular manslaughter with ordinary negligence (Count 2), driving under the
13 influence and causing bodily injury (Count 4), and driving while having 0.08%
14 alcohol or more in his blood and causing bodily injury (Count 5). (CT 219-22; RT
15 842-47).² As to all of the foregoing counts, the jury also found true, among other
16 special allegations, that petitioner had suffered both a prior conviction for driving
17 under the influence of alcohol and a prior conviction for driving while having
18 0.08% alcohol or more in his blood. (CT 219-22; RT 842-46). Petitioner
19 thereafter admitted that in 2003, he had suffered a prior felony conviction for
20 being a felon in possession of a firearm. (RT 863-64).

21 On July 26, 2012, the trial court sentenced petitioner to a total of 16 years to
22 life in state prison. (CT 240-43, 261-62; RT 871). More specifically, the court
23 imposed a sentence of 15 years to life on Count 1 and a consecutive sentence of
24 one year based upon the 2003 prior conviction. (CT 240-43, 261-62; RT 871).
25 The court did not impose sentence on the remaining counts – Counts 2, 4 and 5 –
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27 ²The jury was unable to reach a verdict on the second degree murder charge (Count 3),
28 and that charge was dismissed. (CT 225; RT 847-79, 852, 857-58).

1 because they constituted lesser included offenses of Count 1. (CT 242-43; RT
2 864-66, 871).

3 On April 4, 2014, the California Court of Appeal affirmed the judgment.
4 (Lodged Doc. 7). On June 18, 2014, the California Supreme Court denied review.
5 (Lodged Doc. 9).

6 Petitioner thereafter sought and was denied habeas relief in the Los Angeles
7 County Superior Court, the California Court of Appeal, and the California
8 Supreme Court. (Lodged Docs. 10-12, 14-17).

9 **III. FACTS³**

10 Between about 7:00 p.m. and 8:00 p.m. on July 17, 2010, petitioner drank
11 between four and 15 eight-ounce glasses of beer. (RT 393-94, 578, 583-84). By
12 approximately 8:20 p.m., petitioner had a blood alcohol level of between 0.26%
13 and 0.32%.⁴ (RT 579, 589, 610). At about that time, petitioner was driving south
14 on San Pedro Street when he hit and killed pedestrian Mary Webster, who was
15 crossing San Pedro between 79th and 80th Streets. (RT 373-74, 459, 496-98,
16 630). A security camera at a market recorded the collision. (RT 439, 492-93,
17 496). The recording was played for the jury. (RT 492-93).

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20 ³The Court has independently reviewed the entire state court record. See Nasby v.
21 McDaniel, 853 F.3d 1049 (9th Cir. 2017) (essentially holding that federal habeas court required
22 to review independently state court record where relief sought on basis of record before state
court).

23 ⁴A blood sample was taken from petitioner at about approximately 1:25 a.m. on July 18,
24 2010. (RT 478, 553, 555, 583). Such sample had a blood alcohol level of 0.22%. (RT 572, 576-
25 79, 583). Although petitioner admitted to a police officer at the scene that he had drunk four
26 eight-ounce glasses of beer beginning at 7:00 p.m., the criminalist who analyzed petitioner's
27 blood sample estimated that petitioner would have had to drink about 14 or 15 eight-ounce
28 glasses of beer to have a blood alcohol level of 0.22% five hours later. (RT 583-84). The
criminalist estimated that at the time of the collision, five hours before the blood sample was
taken, petitioner's blood alcohol would have been between 0.26% and 0.32%. (RT 579, 589,
610).

1 Los Angeles Police Officers Errin Burns and Kiel Kearney responded to the
2 scene. (RT 373-74, 484). Burns saw Webster lying in the street and petitioner
3 kneeling next to her. (RT 388, 390). Petitioner was very emotional. (RT 435-36,
4 447). Burns observed objective signs of petitioner's intoxication – he emitted a
5 strong odor of alcohol, he was very sweaty, his face was flushed, his eyes were
6 watery and bloodshot, his gait was unsteady and his speech was slow and slurred.
7 (RT 430-32). Petitioner stated that he had drunk four beers starting at about 7:00
8 p.m. and that his license was currently suspended as the result of a prior driving
9 under the influence conviction. (RT 392-96, 432-33). While Burns was speaking
10 to petitioner, a patrol car equipped with a camera arrived at the scene and Burns's
11 interview of petitioner, which was already in progress, was recorded. (RT 397-
12 99). A recording of the interview was played for the jury. (RT 399-403). The
13 same patrol car camera recorded Officer Trovato arriving at the scene and
14 administering field sobriety tests to petitioner. (RT 403-04, 428-29). Such
15 recording was also played for the jury. (RT 403-04, 428-29).

16 Trovato's partner that night, Officer Lashawn Robins, testified that after
17 Trovato performed the field sobriety tests, she and Trovato transported petitioner
18 to the 77th Street Police Station where Robins tried to administer a chemical
19 breath test. (RT 534-41). Petitioner was unable to breathe into the tube long
20 enough to get a sufficient sample. (RT 541-44). Petitioner ultimately declined to
21 agree to submit to a blood test, but did not physically resist when his blood was
22 being taken. (RT 474-76, 478-79, 544-48, 550). Nurse James McKeever drew
23 petitioner's blood at about 1:25 a.m. on July 18, 2010. (RT 553, 555). Criminalist
24 Chrissy Su analyzed petitioner's blood sample and determined that it had a blood
25 alcohol level of 0.22%. (RT 572, 576-79, 583). Su estimated that at the time of
26 the collision, petitioner's blood alcohol would have been between 0.26% and
27 0.32%. (RT 579, 589, 610); see supra note 4.

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1 At a later time, approximately eight months before trial, petitioner
2 approached and spoke to the victim's brother, Bernard Webster, following a court
3 proceeding. (RT 330, 332-33). Petitioner told the victim's brother that he was
4 sorry for what had happened to the victim, that he just hadn't seen her, that she
5 wasn't in the wrong, and that petitioner had been drinking all day. (RT 333-34).

6 **IV. STANDARD OF REVIEW**

7 This Court may entertain a petition for writ of habeas corpus on "behalf of a
8 person in custody pursuant to the judgment of a State court only on the ground that
9 he is in custody in violation of the Constitution or laws or treaties of the United
10 States." 28 U.S.C. § 2254(a). A federal court may not grant an application for
11 writ of habeas corpus on behalf of a person in state custody with respect to any
12 claim that was adjudicated on the merits in state court proceedings unless the
13 adjudication of the claim: (1) "resulted in a decision that was contrary to, or
14 involved an unreasonable application of, clearly established Federal law, as
15 determined by the Supreme Court of the United States"; or (2) "resulted in a
16 decision that was based on an unreasonable determination of the facts in light of
17 the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).⁵

18 In applying the foregoing standards, federal courts look to the last reasoned
19 state court decision and evaluate it based upon an independent review of the
20 record. See Nasby v. McDaniel, 853 F.3d 1049 (9th Cir. 2017); Smith v.
21 Hedgpeth, 706 F.3d 1099, 1102 (9th Cir.), cert. denied, 133 S. Ct. 1831 (2013).
22 "Where there has been one reasoned state judgment rejecting a federal claim, later
23 unexplained orders upholding that judgment or rejecting the same claim are

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25 ⁵When a federal claim has been presented to a state court and the state court has denied
26 relief, it may be presumed that the state court adjudicated the claim on the merits in the absence
27 of any indication or state-law procedural principles to the contrary. Harrington v. Richter, 562
28 U.S. 86, 99 (2011); see also Johnson v. Williams, 133 S. Ct. 1088, 1094-96 (2013) (extending
Richter presumption to situations in which state court opinion addresses some, but not all of
defendant's claims).

1 presumed to rest upon the same ground.” Ylst v. Nunnemaker, 501 U.S. 797, 803
2 (1991); Cannedy v. Adams, 706 F.3d 1148, 1158 (9th Cir. 2013) (it remains Ninth
3 Circuit practice to “look through” summary denials of discretionary review to the
4 last reasoned state-court decision), as amended on denial of rehearing, 733 F.3d
5 794 (9th Cir. 2013), cert. denied, 134 S. Ct. 1001 (2014); but see Kernan v.
6 Hinojosa, 136 S. Ct. 1603, 1606 (2016) (Ylst presumption is rebuttable; strong
7 evidence can refute it).

8 **V. DISCUSSION**

9 **A. Petitioner Is Not Entitled to Federal Habeas Relief on His** 10 **McNeely Claim (Ground One)**

11 In Missouri v. McNeely, 133 S. Ct. 1552 (2013) (“McNeely”) – which was
12 decided after petitioner was sentenced and while his direct appeal was pending –
13 the Supreme Court held that the natural metabolization of alcohol in the
14 bloodstream does not present a *per se* exigency that justifies an exception to the
15 Fourth Amendment’s search warrant requirement for nonconsensual blood testing
16 in drunk driving cases; exigency must be determined case by case based on the
17 totality of the circumstances. See McNeely, 133 S. Ct. at 1556, 1563 (observing
18 that “while the natural dissipation of alcohol in the blood may support a finding of
19 exigency in a specified case, . . . it does not do so categorically”). Petitioner
20 contends in Ground One that McNeely, “dictates habeas relief” because petitioner
21 was forced to provide a blood sample against his will in violation of the Fourth
22 Amendment. (Petition, Ground One; Petition at 5, 10-11, 19-24). He essentially
23 contends that the admission of Criminalist Su’s analysis – which is summarized
24 above and was not the subject of a motion to suppress or pertinent objection⁶ –
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26 ⁶Although petitioner’s counsel asserted a chain of custody objection to the admission of
27 the blood/blood analysis at the conclusion of the prosecution’s case in chief (RT 663-64), the
28 record does not reflect that the seizure of blood from petitioner was the subject of a motion to
(continued...)

1 violated the Fourth Amendment and should have been suppressed because it was a
2 product of the unlawful forced seizure of his blood.

3 The Los Angeles County Superior Court – the last state court to issue a
4 reasoned decision addressing this claim – rejected it on the merits on habeas
5 review, finding that the instant case fell within the good faith exception to the
6 exclusionary rule. (Lodged Doc. 11 (citing People v. Harris, 234 Cal. App. 4th
7 671 (2015)). As petitioner’s claim is not cognizable on federal habeas review,
8 and as the decision of the Los Angeles County Superior Court was not contrary to,
9 or an objectively unreasonable application of, clearly established federal law and
10 was not based on an unreasonable determination of the facts in light of the
11 evidence presented, petitioner is not entitled to federal habeas relief on Ground
12 One.

13 **1. Petitioner’s Fourth Amendment Claim Is Not Cognizable**
14 **on Federal Habeas Review**

15 Ground One is not cognizable in these federal habeas proceedings. Where
16 the state has provided an opportunity for full and fair litigation of a Fourth
17 Amendment claim, a state prisoner may not be granted habeas corpus relief on the
18 ground that evidence obtained in an unconstitutional search or seizure was
19 introduced at his trial. See Stone v. Powell, 428 U.S. 465, 494 (1976); Newman v.
20 Wengler, 790 F.3d 876, 878 (9th Cir. 2015) (Stone survived the passage of the
21 Antiterrorism Effective Death Penalty Act and bars a Fourth Amendment claim on
22 federal habeas review where a petitioner had a full and fair opportunity in state
23 court to litigate such claim); Ortiz-Sandoval v. Gomez, 81 F.3d 891, 899 (9th Cir.
24 1996) (Stone renders Fourth Amendment claim not cognizable in federal habeas
25 proceedings if a petitioner has had a full and fair opportunity to litigate the claim
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27 ⁶(...continued)
28 suppress or objection. See Seguro v. United States, 275 U.S. 106, 110-11 (1927) (failure to
object constitutes a waiver of Fourth Amendment right against unlawful search and seizure).

1 in state court). “The relevant inquiry is whether the petitioner had the opportunity
2 to litigate his claim, not whether he did in fact do so or whether the claim was
3 correctly decided.” Ortiz-Sandoval v. Gomez, 81 F.3d at 899 (citations omitted).

4 Although petitioner’s counsel did not move to suppress the blood alcohol
5 evidence or otherwise object to the introduction of such evidence based upon the
6 forced seizure of blood from petitioner, he nonetheless had a full and fair
7 opportunity to litigate petitioner’s Fourth Amendment claim under California
8 Penal Code section 1538.5. See Cal. Penal Code § 1538.5 (authorizing criminal
9 defendants to seek the suppression of evidence obtained as a result of an
10 unreasonable search or seizure); Gordon v. Duran, 895 F.2d 610, 613-14 (9th Cir.
11 1990) (discussing same as foreclosing relief under Stone). Because petitioner
12 could have litigated his Fourth Amendment challenge at trial, his Fourth
13 Amendment claim is not cognizable in these proceedings and must be rejected.
14 See, e.g., Oenning v. Harris, 2015 WL 237899, at *2 (N.D. Cal. Jan. 16, 2015)
15 (rejecting challenge that petitioner was not afforded a full and fair opportunity to
16 litigate his Fourth Amendment claim because McNeely was decided after the trial
17 court ruled on his suppression motion; claim was not cognizable under Stone),
18 cert. of appealability denied, No. 15-15171 (9th Cir. Aug. 31, 2015).

19 **2. In Any Event, a Motion to Suppress the Evidence from the**
20 **Forced Blood Draw Would Have Been Denied and the**
21 **Superior Court’s Rejection of Ground One Was**
22 **Reasonable**

23 The Court observes that counsel had good reason not to move to suppress
24 the evidence in issue as any such motion would have been denied based on then
25 existing law. At the time a forced blood sample was seized from petitioner,
26 Schmerber v. California, 384 U.S. 757 (1966), was controlling authority.
27 Schmerber permitted warrantless blood draws in driving under the influence (DUI)
28 investigations performed in a medically approved manner. See Schmerber v.

1 California, 384 U.S. at 770-72. “Post-Schmerber and pre-McNeely, a period
2 spanning nearly 50 years, California cases uniformly interpreted Schmerber to
3 mean that no exigency beyond the natural evanescence of intoxicants in the
4 bloodstream, present in every DUI case, was needed to establish an exception to
5 the warrant requirement.” People v. Jiminez, 242 Cal. App. 4th 1337, 1362-63
6 (2016) (citations and internal quotation marks omitted).

7 “[S]earches conducted in objectively reasonable reliance on binding
8 appellate precedent are not subject to the [Fourth Amendment’s] exclusionary
9 rule.” Davis v. United States, 564 U.S. 229, 232 (2011). When police conduct a
10 search in compliance with binding precedent that is later overruled, the
11 exclusionary rule does not bar the admission of evidence thereby obtained. Id. at
12 232; see also id. at 241 (“[W]hen binding appellate precedent specifically
13 *authorizes* a particular police practice, well-trained officers will and should use
14 that tool to fulfill their crime-detection and public-safety responsibilities. An
15 officer who conducts a search in reliance on binding appellate precedent does no
16 more than act as a reasonable officer would and should act under the
17 circumstances.”) (emphasis original; citations and internal quotation marks
18 omitted).

19 In petitioner’s case, the blood draw was performed after petitioner had run
20 over Ms. Webster, admitted that he had been drinking, and exhibited signs of
21 inebriation. At the preliminary hearing, both Officers Burns and Trovato testified
22 about petitioner’s apparent inebriation at the collision site. Officer Burns
23 observed that petitioner “had a strong odor of alcoholic beverage emitting from
24 his breath,” he was “very sweaty,” his eyes were bloodshot, and his gait was
25 “somewhat unsteady.” (CT 13; see also RT 388, 391, 394, 430-32, 444, 451
26 (Burns’s consistent trial testimony, stating that petitioner told her he had been
27 drinking beer, *i.e.*, four eight-ounce glasses)). Officer Trovato (who did not testify
28 at trial) also observed that petitioner’s breath smelled of alcohol, he had slurred

1 speech, his eyes were bloodshot and watery, he was disheveled, and he had poor
2 coordination. (CT 37-42). Field sobriety testing of petitioner's eyes, balance, and
3 walking yielded results consistent with alcohol use that in Officer Trovato's
4 opinion rendered petitioner unable safely to operate a vehicle. (CT 40-46, 51-54).
5 Petitioner reportedly said to Trovato, "It's no secret I've been drinking. I just
6 came from a funeral." (CT 40).

7 Sergeant Hayes testified a trial that the police may do a forced blood draw
8 for chemical testing in a DUI investigation if the subject refuses to give a sample.
9 (RT 470-71). Sergeant Hayes had explained to petitioner that he had an obligation
10 under California law to submit to a chemical test from a standard admonition. (RT
11 471-74). Petitioner refused to give a sample. (RT 474-76). A forced blood
12 sample then was taken from petitioner. (RT 476-81; 546-50, 553-56).

13 Given these facts, reasonable police officers would have believed that they
14 were authorized to draw petitioner's blood under Schmerber. Any motion to
15 suppress the blood alcohol evidence properly would have been denied. See People
16 v. Jiminez, 242 Cal. App. 4th at 1365 (finding same where evidence was that
17 defendant ran over pedestrians and informed a nurse with a police officer present
18 that the defendant was "withdrawing from methamphetamine"). Indeed, on habeas
19 review the Superior Court rejected petitioner's claim because the precedent at the
20 time of petitioner's investigation was that probable cause of DUI and the natural
21 dissipation of alcohol or drugs in the bloodstream justified a warrantless blood
22 test, the police officers acted in good faith reliance on such precedent, and the
23 exclusion of the evidence in issue would not have achieved the exclusionary rule's
24 purpose of deterring Fourth Amendment violations. (Lodged Doc. 11 (citing
25 People v. Harris, 234 Cal. App. 4th 671, 676 (2015)). In light of the foregoing, the
26 Superior Court's rejection of petitioner's instant claim was not contrary to, or an
27 unreasonable application of clearly established Federal law and was not based on

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1 an unreasonable determination of the facts in light of the evidence presented in the
2 State court proceeding.

3 **B. Petitioner Is Not Entitled to Federal Habeas Relief on His**
4 **Ineffective Assistance of Counsel Claim (Ground Two)**

5 In Ground Two, petitioner contends that his trial counsel rendered
6 ineffective assistance by failing to introduce evidence that the victim had cocaine
7 in her system at the time of the accident to mitigate petitioner’s culpability.
8 (Petition, Ground Two; Petition at 5, 11, 19, 25-26). The Los Angeles County
9 Superior Court – the last state court to issue a reasoned decision addressing this
10 claim – rejected it on the merits on habeas review, reasoning that whether the
11 victim had cocaine in her system was “totally irrelevant” and “likely would not
12 have been admissible.” (Lodged Doc. 11). Petitioner is not entitled to federal
13 habeas relief on this claim.

14 **1. Additional Pertinent Facts**

15 At the preliminary hearing, petitioner’s counsel asked the doctor who
16 performed the autopsy on Ms. Webster whether he did a toxicology test and what
17 the findings were. (CT 5-7). Over the prosecution’s objection, the doctor said that
18 a toxicology test showed that Ms. Webster had cocaine in her system at a level of
19 0.28 micrograms per milliliter. (CT 7-8). The court asked counsel the legal
20 relevance to Ms. Webster’s intoxication, and counsel stated that if the victim is the
21 cause of an accident – as would be argued in this case – Ms. Webster’s
22 intoxication would be relevant to whether petitioner was grossly negligent in his
23 driving. (CT 8-9).

24 During trial outside the presence of the jury, the trial court noted that it had
25 read a vehicular manslaughter case where the victim was not wearing a seatbelt,
26 People v. Wattier, 51 Cal. App. 4th 948, 953 (1996) (“Facts attacking legal
27 causation are only relevant if the defendant’s act was *not* a substantial factor in
28 producing the harm or injurious situation. The defendant is liable for a crime

1 *irrespective* of other concurrent causes contributing to the harm, and particularly
2 when the contributing factor was a preexisting condition of the victim.”)
3 (emphasis original; internal citations omitted). To the court, it seemed that, unlike
4 in Wattier, “the actions of the victim who died in this case [were] very much a part
5 of the accident.” (RT 421-25). The trial record reflects no further discussion or
6 evidence regarding the victim’s actions beyond how she crossed the street and
7 likewise reflects no discussion or evidence of her toxicology results.

8 The doctor who performed the autopsy on Ms. Webster testified at trial
9 about the victim’s injuries but was not questioned about any toxicology results for
10 Ms. Webster. (RT 622-30).

11 **2. Pertinent Law**

12 The Sixth Amendment guarantees the effective assistance of counsel at trial.
13 See Strickland v. Washington, 466 U.S. 668, 686 (1984). To warrant habeas relief
14 on an ineffective assistance of counsel claim, a petitioner must demonstrate both
15 that: (1) counsel’s performance was deficient; and (2) the deficient performance
16 prejudiced his defense. Id. at 668, 687-93, 697. As both prongs of the Strickland
17 test must be satisfied to establish a constitutional violation, failure to satisfy either
18 prong requires that an ineffective assistance claim be denied. Id. at 697.

19 Counsel’s representation is “deficient” if it “fell below an objective standard
20 of reasonableness.” Id. at 688; Harrington v. Richter, 562 U.S. at 104, 111.
21 Courts must apply a “strong presumption” that an attorney’s performance was
22 within “the wide range of reasonable professional assistance.” Richter, 562 U.S.
23 at 104 (citation omitted). A petitioner can overcome the presumption only by
24 showing that, when viewed from counsel’s perspective at the time, the challenged
25 errors were so egregious that counsel’s representation “amounted to incompetence
26 under ‘prevailing professional norms.’” Id. at 105 (citation omitted).

27 Deficient performance is prejudicial if “there is a reasonable probability
28 that, but for counsel’s unprofessional errors, the result of the proceeding would
have been different.” Strickland, 466 U.S. at 694. A reasonable probability is one

1 that is “sufficient to undermine confidence in the outcome” of the trial. Id. The
2 likelihood that a verdict would have been different “must be substantial, not just
3 conceivable.” Richter, 562 U.S. at 112 (citation omitted).

4 Where there has been a state court decision rejecting a Strickland claim,
5 review is “doubly” deferential. Richter, 562 U.S. at 105 (citing Knowles v.
6 Mirzayance, 556 U.S. 111, 123-24 (2009)). “The pivotal question is whether the
7 state court’s application of the Strickland standard was unreasonable.” Richter,
8 562 U.S. at 101; see also 28 U.S.C. § 2254(d). “[E]ven a strong case for relief
9 does not mean the state court’s contrary conclusion was unreasonable.” Richter,
10 562 U.S. at 102 (citing Lockyer v. Andrade, 538 U.S. 63, 71 (2003)). Relief is
11 available only if “there is no possibility fairminded jurists could disagree” that the
12 state court’s application of Strickland was incorrect. Richter, 562 U.S. at 102.
13 Moreover, since “[t]he Strickland standard is a general one, [] the range of
14 reasonable applications is substantial.” Id. at 105 (citing Knowles, 556 U.S. at
15 123).

16 **3. Analysis**

17 Petitioner fails to overcome the strong presumption that his trial counsel’s
18 election to forego eliciting evidence of the cocaine in Ms. Webster’s system was
19 sound trial strategy under the circumstances. Strickland, 466 U.S. at 689.

20 Petitioner’s defense was that, notwithstanding his drinking, he had been
21 driving safely at the time of the collision and that Ms. Webster simply stepped out
22 in front of petitioner’s car without sufficient time for petitioner to avoid hitting
23 her. Petitioner’s counsel admitted in his opening statement that petitioner had
24 been drinking before he drove that evening and did have prior convictions, but
25 indicated that the evidence would establish that petitioner was not grossly
26 negligent when he drove, and instead that he was driving safely. (RT 326-28).
27 Petitioner’s counsel pointed out that the evidence would show that petitioner was
28 driving in his own lane of traffic at approximately 40 miles per hour in a 35 mile

1 per hour speed zone, when Ms. Webster jaywalked “at a staggered angle” in front
2 of petitioner’s car. (RT 327-29). Petitioner slammed on his brakes and tried to go
3 around Ms. Webster, but she was going back and forth between lanes and moved
4 right into petitioner’s lane as he tried to swerve around her. (RT 327; see also RT
5 791-96, 803-13 (counsel arguing similarly in closing)).

6 Petitioner’s counsel elicited evidence to support the defense explained in his
7 opening statement. A responding police officer testified from the video footage of
8 the collision that Ms. Webster was walking outside of an “unmarked crosswalk”
9 (*i.e.*, a permissible place to cross the street at an intersection that was not painted
10 as a crosswalk), just prior to being hit. (RT 494-97, 532). By state law, she
11 should have yielded to traffic because she was not in a crosswalk. (RT 498, 508).
12 The officer further testified, however, that even if a pedestrian is outside a
13 crosswalk, drivers have a duty to use all due care to yield the right of way when
14 approaching a pedestrian. (RT 498-99, 508-09, 516, 529-30, 532). Petitioner
15 swerved from the number two lane to the number one lane right at the point of
16 impact – suggesting that petitioner was trying to avoid hitting Ms. Webster. (RT
17 530, 681-82). The speed limit was 35 miles per hour but the officer opined based
18 on his experience, the footage, and the evidence from the collision that petitioner
19 had been driving faster than 35 miles per hour. (RT 500-02, 509-12, 517). An
20 expert for the defense opined that petitioner had been driving between 35 and 45
21 miles per hour. (RT 682-90, 694).

22 Petitioner’s counsel – in support of a California Penal Code section 1118.1
23 motion for judgment of acquittal – argued to the court outside the presence of the
24 jury, that there was insufficient evidence to establish that petitioner drove with
25 gross negligence to support the murder charge (which was ultimately dismissed
26 after the jury was unable to reach a verdict thereon) or the gross vehicular
27 manslaughter charge. (RT 635-37). The trial court disagreed, noting it had “little
28 trouble” denying petitioner’s motion in light of the evidence. (RT 637).

1 Counsel cannot be faulted for failing to try to admit toxicology results for
2 Ms. Webster at trial. Counsel purposefully may have refrained from introducing
3 the cocaine evidence because counsel was arguing in petitioner's defense that
4 petitioner's consumption of alcohol – a fact counsel could not dispute – did not
5 impair how petitioner was driving at the moment of the collision sufficient for the
6 jury to find he was grossly negligent. If counsel had argued that Ms. Webster was
7 impaired when she stepped into the street, the prosecution undoubtedly would
8 have countered that petitioner also was impaired such that his intoxication was a
9 “substantial factor” for criminal liability. People v. Wattier, 51 Cal. App. 4th at
10 953. Strategic decisions, such as the choice of a defense or which evidence to
11 present, “are virtually unchallengeable” if “made after thorough investigation of
12 law and facts relevant to plausible options.” Strickland, 466 U.S. at 690. There is
13 no suggestion in petitioner's case that his counsel did not thoroughly investigate
14 the applicable law and facts.

15 Assuming, *arguendo*, the toxicology evidence would have been admissible
16 at trial had counsel sought to introduce it, petitioner has not shown a reasonable
17 probability that the outcome of trial would have been different if the jury had
18 known that Ms. Webster had cocaine in her system. Strickland, 466 U.S. at 694.
19 As summarized herein, the jury was presented with evidence that Ms. Webster
20 jaywalked in front of petitioner's car. The fact that there was cocaine in her
21 system would not have changed the substantial other evidence of petitioner's own
22 culpability, *i.e.*, that petitioner, having suffered two prior DUI convictions (RT
23 728-33), chose to drink to excess and, even though his driver's license had been
24 revoked, then chose to get behind the wheel of his truck and drive that evening
25 (RT 388, 391, 394, 430-32, 444, 451).

26 In short, the Los Angeles County Superior Court's rejection of Ground Two
27 was not unreasonable and petitioner is not entitled to federal habeas relief on such
28 claim.

1 **VI. ORDER**

2 IT IS THEREFORE ORDERED: (1) the Petition is denied and this action is
3 dismissed with prejudice; and (2) Judgment shall be entered accordingly.

4 DATED: May 11, 2017

5 /s/

6 Honorable Jacqueline Chooljian
7 UNITED STATES MAGISTRATE JUDGE
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